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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 696

THE FIRST NATIONAL BANK OF CHICAGO, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF OTTO YOUNG, DECEASED, AND IN ITS INDIVIDUAL CAPACITY, GWENDOLYN YOUNG HEYWORTH KOCH, MARIE JULIA YOUNG KAUFMAN PRATT, OTTO YOUNG KAUFMAN, OTTILIE WICKES COCHRAN, BETTY WICKES SAGE, NANCY WICKES SHAW, WALTER F. WICKES, JR., CATHERINE YOUNG WICKES, AND JOHN WILLIAM YOUNG MARTIN,

Petitioners,

vs.

MARGARET DE KORWIN, INDIVIDUALLY, AND AS EXECUTRIX OF THE WILL OF JOSEPH MARIA DE KORWIN, DECEASED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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MARGARET DE KORWIN, INDIVIDUALLY, AND AS EXECUTRIX OF THE WILL OF JOSEPH MARIA DE KORWIN, DECEASED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of THE FIRST NATIONAL BANK OF CHICAGO, Trustee under the Last Will and Testament of Otto Young, Deceased, and in its individual capacity, Gwendolyn Young Heyworth Koch, Marie Julia Young Kaufman Pratt, Otto Young Kaufman, Ottilie Wickes Cochran, Betty Wickes Sage, Nancy Wickes Shaw, Walter F. Wickes, Jr., Catherine Young Wickes, and John William Young Martin, by their respective attorneys, respectfully shows:

STATEMENT OF THE MATTER INVOLVED.

There is here involved the question whether the Federal District Court in Illinois has jurisdiction to hear and determine this cause.

The plaintiff, an alien, alleged diversity of citizenship jurisdiction, the defendants being citizens of several States.

Jurisdiction was challenged on the ground that upon the accepted principle of realignment of parties in accordance with their interests, certain Illinois citizens, parties defendants, became aligned on the side of the plaintiff and opposed to other Illinois citizens; thereby destroying diversity of citizenship jurisdiction. (*Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 69; *Niles-Bement-Pond Co.* v. *Iron Moulders Union Local No. 68, et al.*, 254 U. S. 77, 81; *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 180; *Foster on Federal Practice*, 6th Edition, Vol. 1, P. 126.

After argument on this question and pending the filing of briefs, the plaintiff moved for leave to dismiss as not indispensable the defendants whose presence defeated diversity of citizenship, and to file an amended complaint omitting such persons as parties defendant. (R. 128.) The proposed amended complaint was submitted with the motion and is found in the record. (R. 163, 128-156.)

The District Court, having considered the pleadings and the proposed amended complaint and briefs and oral argument, denied the motion for leave to dismiss such defendants, and the motion for leave to file the amended complaint, and dismissed the cause for lack of jurisdiction. (R. 162.)

On appeal the Circuit Court of Appeals recognized the validity of the realignment rule, but held that the parties defendant in question were not indispensable, that the

cause could proceed to a decree without them and that, therefore, diversity of citizenship did exist. The decision of the District Court was reversed.

The determination of this fundamental question, whether certain parties are indispensable to this litigation, depends upon the interest of the parties, plaintiff and others, in the subject matter of the suit, as those interests appear from the facts set up in the complaint.

The original plaintiff is named in the complaint as "Joseph Maria de Korwin (otherwise known as Count Korwin-Sokolowski)," (R. 3) "a citizen of the Republic of Poland domiciled in Cannes, France, and sojourning presently in Chicago, Illinois." The defendants are described as citizens of Illinois, California, Florida, Maryland, Michigan, New Jersey, and Pennsylvania. (R. 4.)

While the suit was pending in the District Court, the plaintiff died and his widow, Margaret de Korwin, individually and as Executrix of his estate, was substituted as plaintiff. For convenience, however, we will refer to the original plaintiff. (R. 160, 161.)

His suit, which was brought in November 1943, sought to declare invalid the trust provisions of the residuary clause of the Will of Otto Young of Chicago who died in 1906, and to declare the property of the decedent to be intestate and to pass under the Illinois Statute of Descent to the "heirs" of the decedent, the plaintiff using the term "heirs" to mean the original heirs and all those claiming through the deceased heirs, that is, their heirs, executors and administrators. In this petition we will use the term "heirs" as the plaintiff has used it.

The plaintiff states he is the divorced husband of a daughter of Otto Young, Selma Cecile, who died in 1935, and that they had one child, Stanislaus Stephen de Korwin, (sometimes known as Stanley Korwin Young) who died intestate and without issue. Upon these facts he claims

that he has become an heir of Otto Young. (Par. 6, 7, R. 5; Par. 20, R. 13.)

He made as parties defendant some but not all of the beneficiaries of the trust created by the Will, and some but not all of the heirs who would now be entitled to share in the property of the decedent if it were held to be intestate. (R. 44.)

The complaint alleges: That the decedent, Otto Young left as his sole heirs a widow and four daughters; that the residuary clause of his Will set up a trust estate consisting of cash, securities and "many parcels of real estate situated in the downtown or 'loop district' of Chicago reputed to have a fair valuation of upward of $50,000,000." (R. 4, 5, 7); that the First Trust and Savings Bank of Chicago was named as Trustee (R. 7); that it and its successors, First Union Trust and Savings Bank, a consolidated corporation of the State of Illinois, and The First National Bank of Chicago, consolidated under an Act of Congress, the McFadden Act of 1927, have administered the trust since 1906 up to the present time. (R. 4.)

The Will provides that the trust income during the lives of the widow of Otto Young and his daughters is to be distributed in part to them and in part accumulated. Upon the death of each daughter and until the termination of the trust, the issue of such deceased daughter is to receive her share.

The trust is to terminate when the last survivor of the decedent's daughters shall have died and the youngest surviving child of his daughters shall have attained the age of twenty-one years.

The principal of the trust upon its termination is to be distributed to the decedent's grandchildren and the issue of any deceased grandchild. (Comp. Pars. 2-20; R. 4-13.)

As the objectives of the suit, plaintiff charged in the complaint: That the disposition in trust was invalid as in

conflict with the rule against perpetuities; that the estate sought to be devised "falls under the operation of the Illinois Statute of Descent, descends as intestate property, and vests in the heirs at law of the testator;" that the plaintiff is an heir of Otto Young and "as such is entitled to a distributive share of the testator's estate now held by the defendant, The First National Bank, as Trustee," (R. 13, 139), and entitled "to compel distribution of the testator's estate to himself and to the other heirs at law of the decedent as intestate property." (R. 13, 139.)

An alternative objective was to declare the trust valid and the plaintiff to be "issue" of his own son and, as such issue, a beneficiary of the trust. (R. 14, 139.) And also to declare the First National Bank of Chicago to be a Trustee *de son tort* as having no right or power to succeed to the trustee named in the Will, The First Trust and Savings Bank. (R. 16-19, 142-145.)

The prayer of the complaint asked the court:

To construe the Will of Otto Young and declare the devise in trust to be void as contravening the rule against perpetuities (R. 19);

To hold the corpus of the trust to be intestate property (R. 19);

To decree that it be divided and partitioned and distributed to the plaintiff and to the other heirs of the decedent in accordance with their interests as they might be made to appear under the Illinois Statute of Descent (R. 20);

To appoint a receiver and commissioner to take possession of the trust estate and make the division and distribution of it (R. 20);

To hold the plaintiff to be issue of his own son and thereby a beneficiary of the trust estate;

To declare the present Trustee to be acting *de son tort* and the trust vacant and appoint a new Trustee (R. 19).

It is to be noted that the beneficiaries of the trust are the decedent's wife, his four daughters, and their issue, that is, only and all such persons as are in the direct line of descent. On the other hand, the heirs of Otto Young as that word is used by the plaintiff now include many persons collateral to those in the direct line of descent.

In the thirty-eight year period between the death of Otto Young and the bringing of this suit, the widow and three of his daughters have died, and also a number of his grandchildren, and many other changes have occurred in the list of beneficiaries of the trust and the table of heirship.

(For an aid to an understanding of that situation, we have added as an appendix to this petition a Family Tree.)

It appears from the facts set up in the original complaint that there are five persons there named, each of whom, just as the plaintiff, is collateral to the direct line of descent, and has exactly the same interest as that claimed by the plaintiff in the subject matter of the suit. He claims as the surviving father of a deceased grandson of Otto Young to be one of the heirs entitled to the claimed intestate property under the Illinois statute. They also are heirs on the same line of reasoning with the same interest. And, if the trust provisions of the Will are held invalid, they are entitled to share in the property and to have it partitioned and distributed, just as he claims. (The Family Tree referred to graphically indicates these persons.) They are as follows:

First: Ruth Jacoby Young, who is the widow of Stanislaus Stephen de Korwin (otherwise known as Stanley Young), through whom the plaintiff claims. Stanley was the son of the plaintiff and Selma Cecile, one of the daughters of Otto Young. Sometime after his mother's death he died without issue and intestate, leaving his

widow, Ruth Jacoby Young. She stands in the same position as the plaintiff, as an heir of her husband and also, on the plaintiff's theory, the heir of her husband's grandfather, Otto Young. (R. 5, 6.)

Second: Ruth Jacoby Young, Administratrix of the Estate of Stanislaus Stephen de Korwin, through which plaintiff claims. (R. 3, 5, 6.)

Third: Lawrence Heyworth. He also was a husband of Selma Cecile and divorced from her. They too had a son, Otto Young Heyworth, (a half brother of Stanley), who, after his mother's death, died without issue and intestate.

Fourth: Evelyn Heyworth, the widow of Otto Young Heyworth. (R. 4, 5.)

Fifth: Lawrence Heyworth, Jr., a half brother of Otto Young Heyworth, the son of Lawrence Heyworth and his second wife. He too is an heir of Otto Young Heyworth and also an heir of Otto Young. (Par. 8, R. 6.)

Since there is no allegation in the complaint concerning the citizenship of these parties, they are presumed to be residents of the State of Illinois.

The amended complaint sought to be filed after the argument on jurisdiction, in an apparent effort to cure the defect, eliminated certain of the heirs of Otto Young as parties defendant, specifically those five mentioned above who the defendants claimed defeated diversity of citizenship jurisdiction. If these were indispensable parties, their dismissal could not cure that defect and there would still be no Federal jurisdiction.

The plaintiff in his original complaint named these defendants as heirs of Otto Young. They are all just as much Otto Young's heirs as the plaintiff claims to be. They all have the same interest as he.

It is the petitioners' position in this case:

These parties are indispensable to this litigation and their presence defeats diversity of citizenship.

That the question of indispensability of the parties in such a case as this is to be determined by the law of Illinois, not the Federal law, and that the decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the decisions of other circuits;

That the question being controlled by the Illinois law, the decision is in conflict with the decisions of the Supreme Court of Illinois;

That even assuming Federal law controls and not State law on this issue, the decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the decisions of the Supreme Court of the United States, and is also in conflict with the decisions of other Circuit Courts of Appeal.

OPINIONS BELOW.

There was no written opinion by Judge Shaw who entered the decree in the District Court.

The opinion of the Circuit Court of Appeals is reported in 158 Fed. (2d) 858, and is to be found at page 181 of the Record.

STATEMENT AS TO THE JURISDICTION OF THIS COURT.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. 347(a).

The decision of the Circuit Court of Appeals was rendered August 2, 1946. (R. 181, 188.)

Petition for rehearing duly filed was denied September 11, 1946. (R. 189.)

THE QUESTIONS PRESENTED.

This suit attacks the validity of an Illinois resident's will which disposed of real and personal property in Illinois. It charges: That under the Illinois Statute of Descent the property is intestate, and that the plaintiff and others are heirs of the decedent, and as such have together all of the rights of ownership in the property; and that they are entitled to have it partitioned and distributed among them. The question presented therefore is whether all of such heirs are indispensable parties to the litigation; and being so, upon realignment in accordance with their interest, diversity of citizenship does not exist.

And in this connection, in determining the question of the indispensability of parties, whether State or Federal law must control.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

First: The Circuit Court of Appeals for the Seventh Circuit Has Rendered a Decision in This Case in Conflict With the Holding of Other Circuit Courts of Appeals on the Same Matter. This Conflict Is in the Holding That Federal and Not State Law Controls in Determining the Indispensable Parties to This Litigation Brought to Adjudicate Property Rights Created by the State Law.

The Circuit Court of Appeals for the Seventh Circuit in this case held:

> "Notwithstanding defendants' suggestion to the contrary, we think the rule as to the indispensability of parties must be determined by Federal rather than local rules." (R. 185.)

The Circuit Court of Appeals for the Eighth Circuit held to the contrary in *Young* v. *Garrett*, 149 Fed. (2d) 223. In that suit there was involved the title and right of possession in an undivided interest in land, and the objective sought was ejectment and the recovery of rents and profits and damages for injury to the freehold. And on the fundamental question presented, whether certain heirs of a deceased party in interest were indispensable parties to the litigation, the court said at page 227:

> "Before examining this issue as to indispensable parties, it is necessary to state which law governs —National or State. Where there are no specific national statutes (such as the provision as to assigned choses in action, Title 28 U. S. C. Sec. 41(1), 28 U. S. C. A. § 41(1)) or governing Rules, the Conformity Act (Title 28 U. S. C. Sec. 724, 28 U. S. C. A. § 724) applies and State law controls.

And at page 228:

> "In respect to who are indispensable parties, this Rule is declaratory of the Law (Equity Rule 37, 28 U. S. C. A. § 723 Appendix) as it existed before the Rule. Before the Rule, indispensability of parties depended upon State Law."

The Eighth Circuit also had before it, in an earlier case involving a will contest, the same question as to indispensable parties, *Thomson* v. *Butler*, 136 Fed. (2d) 644, (certiorari denied, 320 U. S. 761). The court said, at page 646:

> "The trial court properly held that the necessary diversity of citizenship was lacking to give a federal court jurisdiction on that ground. Frank Bush, one of the legatees under the will, was a resident of the same state as some of the plaintiffs. Plaintiffs apparently had sought to escape this difficulty by not making him a party to the suit. Under the law of Missouri, however, all devisees and legatees are necessary parties to a will contest."

This court has held in cases involving some of the other and clearly related fundamental requirements upon which Federal jurisdiction is based, that State law controls in determining whether such requirements are satisfied.

Bell v. *Preferred Life Society*, 320 U. S. 238. In an action charging fraudulent misrepresentation and claiming actual damages amounting to only $1,000, and punitive damages in a much larger sum, this court held that the question of jurisdictional amount was to be determined by the State law where the cause of action arose. And since that State law gave the right to recover punitive damages in addition to actual damages, the requirement was satisfied that $3,000 be involved.

Taylor v. *Anderson*, 275 U. S. 431. The Illinois Practice Act with reference to suits by assignees was held to

govern the right of the plaintiff to sue in the District Court.

To the same effect:

Delaware County v. *Diebold Safe Co.*, 133 U. S. 473.

Lyeth v. *Hoey*, 305 U. S. 188 (1938). Here, the court in an income tax case held at page 193:

> "Petitioner's status as heir was thus determined by the law of Massachusetts. That law also regulated the procedure by which his rights as an heir could be vindicated."

See also *Cities Service Co.* v. *Dunlap, et al.*, 308 U. S. 208.

The Federal Rules of Civil Procedure which expressly disclaim any purpose of affecting jurisdiction (Rule 82 and the Enabling Act U.S.C.A. Par. 723(b) and (c)) provide what persons are to be made parties to a suit, as follows:

> "Rule 19. Necessary Joinder of Parties.
> "(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants."

What persons have a joint interest in the subject matter of the suit and the nature of that interest and whether the interest is held by them in common, can only be determined from the same source that creates the interest.

In this case the plaintiff asserts that the source of his interest in the alleged intestate property of the decedent is the Illinois Statute of Descent which specifies the persons who are to have property rights in the intestate property, and in what proportion. That statute is the sole authority for the rights claimed in this case. The rights thus created in the heirs of the decedent to his in-

testate property are joint rights in common. The Supreme Court of Illinois has so held. *Updike* v. *Smith,* 378 Ill. 600, 603.

So that on the strength of the rule promulgated by this court for the District Court, the question who are the persons who shall be made parties, who are the indispensable parties to a suit involving rights created by a State statute, the law of that State must control.

Second: The Question of Indispensable Parties Here Involved Being Governed by the Law of Illinois, the Circuit Court of Appeals for the Seventh Circuit in Holding That Certain Heirs of Otto Young, Deceased, Were Not Indispensable Parties to This Litigation, Has Decided an Important Question of Local Law in Direct Conflict With the Illinois Decisions.

Riley v. *Webb,* 272 Ill. 537. In a suit to set aside an instrument purporting to be a will of the decedent with the attendant result of taking the property from the legatees and distributing it to the heirs of the decedent under the Illinois Statute of Descent, one of the heirs, who was not a legatee, was made a party but not served with process. The will having been held valid, plaintiff moved to vacate the decree because of the absence of the heir mentioned. The Supreme Court of Illinois held that the heir was an indispensable party whether the will be held valid or invalid, saying at page 538:

> "William Riley, one of the defendants in the bill, was a brother of the testator and had a substantial interest in the subject matter of the suit. He was not only a proper but a necessary party. It is a rule in equity that all persons who have any substantial legal or beneficial interest in the subject matter in litigation and who will be materially affected by the decree must be made parties."

And at page 539:

> "It is no answer to say that William Riley was not interested in sustaining the will; that his interests were with the contestants; and that when the decree was entered dismissing the bill the time had gone by in which he could have brought a suit to contest the will. If appellant had proceeded to trial when the issue was submitted to the jury and if he had succeeded in obtaining a verdict finding that the instrument in controversy was not the will of Thomas H. Riley, any of the defendants to the bill, or the court upon its own motion, could have prevented the entry of a decree upon that verdict; or, in case a decree had been entered on the verdict, any of the defendants to the bill could have had such decree set aside by the chancellor during the term of court at which it was entered, or reversed upon appeal or writ of error, on the ground that William Riley had not been served with summons and had not entered his appearance."

Walker v. *Cook*, 294 Ill. 294. A court order admitting a will to probate, although some of the heirs who were not legatees were not named in the proceeding, was held void. The court held at page 299:

> "An heir-at-law is made such by the laws of descent, and his rights should not be taken from him without notice and an opportunity to have his day in court."

McCreery v. *Bartholf*, 305 Ill. 325. This was a will contest in which the court said as to indispensable parties at page 327:

> "It is true that it was necessary for Louis McCreery to make parties all persons who had any substantial legal or beneficial interest in the will of John H. McCreery and who would be materially affected by a decree entered in a suit to contest that will. (*Brown* v. *Riggin*, 94 Ill. 560; *Riley* v. *Webb*, 272 id. 537.) Appellant was a necessary party, and if the original complainant had failed to name him as a defendant, it

> would have been the duty of the court, as soon as it learned of the situation, to make him a party. (*McMechan* v. *Yenter*, 301 Ill. 508.) The reason for this rule is apparent. When all the necessary parties are before the court the whole case may be considered and all interests protected, and the court is enabled to make a complete decree binding on all parties who have a substantial beneficial interest in the subject matter of the litigation and thereby dispose of the whole cause."

See also *Oglesby* v. *Springfield Marine Bank*, 385 Ill. 414; *Hauser* v. *Powers*, 351 Ill. 36; *Brown* v. *Riggin*, 94 Ill. 560; *Rodisch* v. *Moore*, 253 Ill. 296; *Hayden* v. *McNamee*, 392 Ill. 99 (1945); *Giese* v. *Terry*, 388 Ill. 188.

State Life Insurance Co. v. *Board of Education*, 394 Ill. 301, 309, 310, holds that in a controversy involving the distribution of a common fund, all persons in interest are indispensable parties.

Third: If the Question of Indispensable Parties Is to be Governed by Federal Law, Then the Circuit Court of Appeals In This Case Has Decided an Important Question of Federal Law In a Way In Conflict With the Applicable Decisions of This Court.

(In these decisions no question was raised as to which law governed, State or Federal.)

Barney v. *Baltimore City*, 6 Wallace (73 U. S.) 280. This court held in a suit having for its objective the partitioning and distribution of real estate alleged to be intestate property, that all of the heirs of the decedent were indispensable parties to the litigation. The court said (284):

> "And there is a third class, whose interests in the subject-matter of the suit, *and in the relief sought*, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot pro-

> ceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction." (Italics ours.)

And then concluded, at page 287:

> "We are, therefore, of opinion that the Circuit Court could render no decree on the merits of this case, without having rightfully before it some person representing the interest of the Ridgelys." (The absent heirs.)

The principle as stated has been reaffirmed many times by this court. For example, the case quoted from and relied upon by the Circuit Court of Appeals in its decision (R. 185), *Niles-Bement-Pond Co.* v. *Iron Moulders Union Local No. 68, et al.*, 254 U. S. 77, where this court said, in defining indispensable parties, at page 80:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

The assumption of jurisdiction and entry of any decree in this case without all the heirs of the decedent being present would be in direct conflict with these decisions. The issue in this suit is which of two groups of persons is entitled to share in this large trust property—the beneficiaries of the trust under the Will of Otto Young by virtue of the Illinois Statute of Wills (Illinois Revised Statutes 1905, Chap. 148 § 1, or the heirs of Otto Young claiming the property to be intestate and their interests and proportionate shares to be established by the Statute of Descent of the State of Illinois. (Illinois Revised Statutes 1905, Chap. 39, § 1.)

On such an issue no decree could be entered in the absence of any one of the heirs or beneficiaries "without

either affecting that interest" of any absent heir or beneficiary, or "leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." (*Niles-Bement-Pond Co.* v. *Iron Moulders Union Local No. 68, et al.*, 254 U. S. 77; *Barney* v. *Baltimore City*, 6 Wall (73 U. S.) 280.)

The plaintiff's interest is in common with all other heirs. And a decree, as suggested by the court below, in the absence of any one of them, adjudging either that the plaintiff had no interest, or had an interest and not saying what should be done with it, would not be a determination of the litigation. Such a decree would not be binding on the other heirs who were absent; and, because of the principle of mutuality, would not be binding on the beneficiaries in any other suit where such absent heirs are present. In any subsequent litigation by the plaintiff to realize on the interest he might be found to have in this case, the whole matter would have to be litigated over again. This court in the *Barney* case, *supra*, (6 Wallace (73 U. S.) 280) said (P. 285):

> "This language aptly describes the character of the interest of the Ridgelys, in the land of which partition is sought in this suit, and in the account which is asked for, of rents and profits. If a decree is made, which is intended to bind them, it is manifestly unjust to do this when they are not parties to the suit, and have no opportunity to be heard. But as the decree cannot bind them, the court cannot for that very reason afford the relief asked, to the other parties.
>
> "If, for instance, the decree should partition the land and state an account, the particular pieces of land allotted to the parties before the court, would still be undivided as to *these* parties, whose interest in each piece would remain as before the partition. And they could at any time apply to the proper court and ask a repartition of the whole tract, unaffected by the decree in this case, because they can be bound by no decree

> to which they are not parties. The same observations apply to any account stated by the court, of rents and profits, and to any decree settling the amount due on that score."

The only distinction suggested by the Circuit Court of Appeals in our case was (R. 187):

> "We have not overlooked defendants' argument that this is a partition suit. True, the complaint does ask for a partition and division of the trust estate as part of the relief prayed for. This is but incidental, however, to the main purpose of the suit which is the construction of the will of Otto Young. The prayer for the partition may properly be treated as surplusage."

But the absent heirs would not be bound by any construction of the Will of Otto Young. Moreover, both the original and amended complaint assert that by reason of the claimed invalidity of the Will of Otto Young, the plaintiff, is his heir and "as such * * * is entitled to a distributive share of the testator's estate now held by the defendant" and "*to compel distribution* of the testator's estate *to himself and to the other heirs at law* of the decedent as intestate property." (R. 13, 139.) (Italics ours.)

The prayer for relief asks that the trust property be held intestate property, that it "falls under the Statute of Descent of Illinois and must be distributed to the plaintiff and the other heirs at law of Otto Young, deceased, in accordance with their interests as they are fixed by such statute." (R. 19, 20, 145.) And that "the court may direct that the trust estate * * * *be divided and partitioned and distributed as intestate property* to plaintiff and *the other heirs at law* of such decedent in accordance with *their interests as they may be made* to appear under the *Illinois Statute of Descent*." (R. 20, 145.) And "that the court in this connection may appoint a receiver and commissioner to take possession of such trust estate and to make division and distribution thereof." (Italics ours.)

"One of the tests of jurisdiction is the relief prayed for in the complaint, or the subject of the suit." (*Winger* v. *Chicago Bank and Trust Co.*, 394 Ill. 94.)

See *Pomeroy's Equity Jurisprudence*, 5th Edition, Vol. 4, Sec. 1316, 1378.

See *American Jurisprudence*, Vol. 19, Equity, Sec. 17, Page 48.

The Supreme Court in the following cases has held that in litigation involving rights under a contract each party to the contract is an indispensable party to the litigation and that the litigation can not proceed to a decree without him.

Shields v. *Barrow*, 17 Howard (58 U. S.) 130.
Gregory v. *Stetson*, 133 U. S. 579.
Commonwealth Trust Co. v. *Smith*, 266 U. S. 152.

The Circuit Court of Appeals in our case held these cases inapplicable, saying (R. 186):

"We are of the opinion that the cases cited by defendants in support of their position as to the indispensability are inapplicable to the facts of this case. Those cases treat of controversies involving contracts or suits for partition and none involve the construction of a will or actions against an estate."

As though there could be any distinction in the protection of rights, property or otherwise, accorded by the law, as between rights arising from contract and rights arising from a trust instrument or a will.

The cases cited in the decision of the Circuit Court of Appeals, namely *Horn* v. *Lockhart*, 84 U. S. 570, *Payne* v. *Hook*, 74 U. S. 425, and *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, do not overrule, but on the contrary reaffirm the principles laid down in the *Barney* case (73 U. S. 280). The facts and the issues in those suits were such that the interest of the parties was not an interest in com-

mon, so that the plaintiff's claim was with respect to a definite part of a fund which could be segregated, and a decree could be entered without affecting in any way the rights of the absent parties.

Fourth: If the Question of Indispensable Parties Is to be Governed by Federal Law, Then the Circuit Court of Appeals In This Case Has Decided an Important Question of Federal Law In a Way In Conflict With Decisions of Other Circuit Courts of Appeal. This Conflict Is in the Holding That in a Case Such as This to Contest a Will and to Partition and Distribute the Decedent's Property as Intestate, Each of the Decedent's Heirs Is Not an Indispensable Party.

In the following cases the Circuit Courts of Appeal named have held in conflict with this decision. (No question was raised in these cases as to which law governed, State or Federal.)

Berg v. *Merchants,* 15 Fed. (2d) 990, 6th Circuit, (certiorari denied, 274 U. S. 738). In this action to contest a will, some of the heirs who were not beneficiaries were not parties. The court held them to be indispensable.

Crutcher v. *Joyce,* 134 Fed. (2d) 809, 10 Circ. (1943). The court holds that heirs though not beneficiaries were indispensable parties in such a case.

Baird v. *Peoples Bank & Trust Co.,* 120 Fed. (2d) 1001, (3rd C. C. A. 1941). This case involved the construction of a testamentary trust. All beneficiaries, present and contingent, were held by the court to be indispensable.

Grisso v. *U. S.,* 138 Fed. (2d) 996, 10th Circuit, 1943. In a suit to determine who was entitled to a certain piece of land and to partition it among those held to be the owners, the court held that the heirs of a decedent were indispensable parties.

Kendrick v. *Kendrick*, 16 Fed. (2d) 744, 5th Circuit, 1926, certiorari denied, 273 U. S. 758. This was a suit by one heir on behalf of others who were absent to determine ownership of real estate by virtue of a testamentary provision. The court held that heirs are indispensable parties.

Fifth: A Review of This Case Is Fundamental to the Further Conduct of the Case.

This reason is advanced in accord with *United States* v. *General Motors*, 323 U. S. 373, 377:

> "We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case."

This reason for granting certiorari is particularly pertinent to a case where the fundamental question involved is one of jurisdiction.

If the decision of the Circuit Court of Appeals is allowed to stand, there must follow a trial by the District Court of the many complicated questions of law and fact involving the interest of many persons in a large diversified property—a fruitless procedure if jurisdiction does not exist.

As illustrative, we refer to the history of the case cited above, *Indianapolis* v. *Chase National Bank*, 314 U. S. 63. There, jurisdiction was originally denied by the District Court (1937). The Circuit Court of Appeals reversed and held that the District Court did have jurisdiction, 96 Fed. (2d) 363, April 1938. Petition for certiorari to this court was denied, 305 U. S. 600, October 1938. The case was remanded and tried on its merits and a decree entered in the District Court. On appeal the Circuit Court of Appeals reversed in part, 113 Fed. (2d) 217, June 1940. Petitions for certiorari were allowed by this court to review the decree, (311 U. S. 636, 637) and upon review in No-

vember 1941, this court held there was no Federal jurisdiction (314 U. S. 63).

This same pattern could result in the instant case from a denial of certiorari at this point.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8924, Margaret de Korwin, individually, and as Executrix of the Will of Joseph Maria de Korwin, Deceased, Plaintiff-Appellant, *vs.* The First National Bank of Chicago, etc., *et al.*, Defendants-Appellees, and that the judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

THE FIRST NATIONAL BANK OF CHICAGO,
Individually and as Trustee of the
Testamentary Trust of Otto Young,
Deceased,

By J. F. DAMMANN,

WILLIAM B. MCILVAINE, JR.,

GWENDOLYN YOUNG HEYWORTH KOCH,

By CRANSTON SPRAY,

Her Attorney.

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OTTO YOUNG KAUFMAN,
OTTILIE WICKES COCHRAN,
BETTY WICKES SAGE,
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